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**Nos. 04-1528 & 04-1530**

In the
# SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
*Petitioners,*

*v.*

WILLIAM H. SORRELL, *ET AL.*,
*Respondents.*

On Petitions For Writs Of *Certiorari* To The
United States Court Of Appeals
For The Second Circuit

## RESPONSE AND PARTIAL OPPOSITION TO PETITIONS FOR WRITS OF *CERTIORARI*

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## QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether Vermont's limits on campaign contributions to candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

## LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc.; Political Committee; Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in 04-1530*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; Will Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 and 04-1530*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 and 04-1530.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, Dale Gray, Lauren Bowerman, John McNight, George Rice, Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.



## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

STATEMENT OF THE CASE ..... 1

I. Act 64 ..... 1

II. Proceedings Below ..... 3

SUMMARY OF THE ARGUMENT ..... 6

ARGUMENT ..... 8

I. Issuance Of A Writ Of *Certiorari* Is Warranted At This Time To Resolve A Recurring Issue of National Import That Has Divided The Courts Of Appeals ..... 8

A. There Are Two Divisions In The Circuits ..... 8

B. The Constitutionality Of Expenditure Limits Is A Recurring Issue Of National Significance ..... 9

C. The Remand Further Counsels In Favor Of Granting *Certiorari* Review ..... 11

II. The Ruling Below Is Consistent With *Buckley* And Is Well Supported By The Record ..... 12

A. The Second Circuit's Ruling Comports With *Buckley* ..... 12

B. The Record Evidence Fully Supports The Compelling Interests Identified Below ..... 17

1. Vermont's Spending Limits Avoid The Reality And Appearance Of Corruption In Politics And Government ..... 18

2. Vermont's Spending Limits Assure That Officeholders Will Spend Less Time Fundraising And More Time Interacting With Voters And Performing Official Duties ..... 22

III. The Contribution Limits Of Act 64 Do Not Warrant *Certiorari* Review ..... 25

A. There Is No Division Among The Circuits ..... 25

B. Vermont's Contribution Limits Comport With *Buckley* and *Shrink* ..... 28

CONCLUSION ..... 30



## TABLE OF AUTHORITIES

Page

CASE LAW

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ..... 13

*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) ..... 13

*Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) ..... 6

*Burson v. Freeman*, 504 U.S. 191 (1992) ..... 13

*Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) ..... *passim*

*California Democratic Party v. Jones*, 530 U.S. 567 (2000) ..... 26

*Citizens for Responsible Gov't v. Buckley*, 60 F. Supp. 2d 1066 (D. Colo. 1999), vacated, 236 F.3d 1174 (10th Cir. 2000) ..... 26

*Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996) ..... 15,16

*Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) ..... 26,27

*Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ..... 26

*Florida Right to Life, Inc. v. Mortham*, 2000 WL 33733256 (M.D. Fla. March 20, 2000) ..... 26,28

*Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003) ..... 26

*Fullilove v. Klutznick*, 448 U.S. 448 (1980) ..... 13

*Gard v. Wisconsin*, 456 N.W.2d 809 (Wis.), *cert. denied*, 498 U.S. 892 (1990) ..... 27

*Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 125 U.S. 625 (2004) ..... 9,12,15

*Kentucky v. Terry*, 108 F.3d 637 (6th Cir.), *cert. denied*, 522 U.S. 860 (1997) ..... 27

*Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) ..... 9,12,14,

*Landell v. Sorrell*, 382 F.3d 91 (2nd Cir. 2004) ..... 1,8,9,10,11,12

*McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) ..... 12,14,19,20

*Missouri Republican Party v. Lamb*, 270 F.3d 567 (8th Cir. 2001), *cert. denied*, 535 U.S. 1113 (2002) ..... 26

*Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), *cert. denied*, 125 S.Ct. 47 (2004) ..... 26,27

*Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) ..... 12,14,15,26,27,28



*Rosentiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) ..... 16

*Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000) ..... 26,27

*Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) ..... 16

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. I ..... *passim*

U.S. Const. amend XIV ..... i

Vt. Const. ch. I, art. 8 ..... 2

**STATUTES**

17 V.S.A. §2801(3) ..... 5

17 V.S.A. §2805 ..... 3,27

17 V.S.A. §2805a ..... 2

17 V.S.A. §2805a(c) ..... 22

17 V.S.A. §2806 ..... 3

17 V.S.A. §2809 ..... 5,6,25

**CONGRESSIONAL MATERIALS**

131 Cong. Rec. S74 (daily ed. Jan 3, 1985) ..... 33

147 Cong. Rec. S2857 (daily ed. Mar. 26 2001) ..... 23

H. Cong. Res. 377 (106th Congress) ..... 10

H.R. 77 (105th Congress) ..... 10

S. 1502 (106th Congress) ..... 10

**LAW REVIEWS**

Mark Alexander, *Campaign Finance Reform: Central Meaning And A New Approach*, 60 Wash. & Lee L. Rev. 767 (2003) ..... 10

Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L. L. Rev. 1 (1998) ..... 17

Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994) ..... 15,23

Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986) ..... 10

Roland S. Homet, Jr., *Fact-Finding in First Amendment Litigation: the Case of Campaign Finance Reform*, 21 Okla. City U. L. Rev. 97 (1996) ..... 17

**OTHER MATERIALS**

http://www.census.gov ..... 28

http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/passed/S-016.HTM ..... 7



## STATEMENT OF THE CASE

### I. Act 64

The Vermont Legislature passed Act 64 in 1997 after an extraordinary series of hearings on the influence of money in Vermont politics. The hearings unequivocally demonstrated that Vermonters' faith in the integrity of government and in their elected officials was being profoundly shaken by the effects of large contributions and unfettered campaign spending. The hearings showed that the never-ending desire for campaign money often determined the positions of officials on issues, what matters were given legislative priority, who got access to officeholders, and how officials spent their time.

Both Republican and Democratic politicians did not mince words in describing the threat to the electoral process. As Democratic Senator Peter Shumlin confessed to a Senate panel, "I've got to tell you that I wish I could walk up and down this hall now as President Pro Tem and tell you that I know with a clear conscience that I'm not making decisions that are based upon that whole lot of money I raised." Ex. Volume-I at E-0291. Governor Howard Dean was equally blunt in his inaugural address: "money does buy access, and we're kidding ourselves and Vermonters if we deny it." *Landell v. Sorrell*, 382 F.3d 91, 96 (2nd Cir. 2004), reproduced in the Appendix to Petition for a Writ of *Certiorari* in No. 04-1528 ("App."), at 93a-94a. Representative Marion Milne, a Republican, expressed a like concern about:

> candidates who will do anything to raise money. What they have to offer is the same commodity as in Washington – access to the leaders, access to the full attention of those who are supposed to be our models of integrity.

Ex. Vol.-II at E-0732 (Trial Exhibits).

Ultimately, Act 64 was the product of over 65 hearings before five legislative committees at which 145 witnesses testified. App. 31a-32a, 99a. The Legislature

heard from citizens, experienced candidates for Vermont office, public officials, political party leaders, experts on the campaign finance systems of other states, and legal experts from around the country. App. 100a.

At the conclusion of the hearings, both chambers of the Legislature agreed upon Findings with respect to the financing of political campaigns. Those Findings detail how large campaign contributions and unrestrained campaign expenditures had reduced public confidence in government, caused the public to believe that their elected officials were unduly influenced by monied interests, marginalized regular citizens from the political process, and had forced officials to divert their time and energies from their duties to endless fundraising. App. 101a-104a.

Based on its own experience and the full record before it, the Legislature determined that contribution limits and voluntary spending limits alone had been and would continue to be insufficient to deter political corruption and its appearance, to permit officials to devote time to their duties, and to restore public confidence in government. It concluded that, in addition to contribution restraints, mandatory limits on candidate expenditures would be an essential part of any meaningful campaign finance law. 17 V.S.A. §2805a (App. 6a-7a).

Such legislation, it found, was necessary to implement more fully Article 8 of Chapter I of the Vermont Constitution, which declares: "That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." App. 35a.

In setting the appropriate expenditure levels, the Legislature linked the limits to particular offices. It painstakingly considered factors unique to Vermont such as population, media costs, historical information on past spending in campaigns, Vermont's previous voluntary



spending limits, its members' own individual experiences as candidates, and the testimony of numerous witnesses concerning the appropriate levels for the limits. App. 32a-33a. It set the limits at levels sufficient to ensure effective and robust campaigning in Vermont. App. 100a.

The Legislature took equal care in establishing the levels for Act 64's contribution limitations. 17 V.S.A. §2805 (App. 4a-6a). It examined, *inter alia*, campaign finance summaries for various legislative and statewide races in Vermont from 1978 to 1996, as well as reports of contribution patterns. App. 100a. From this evidence it determined what types of contributions are considered large in Vermont and what amounts would permit effective campaigning. The Legislature settled upon contribution figures that are well tailored to the Vermont political landscape.[1]

## II. Proceedings Below

This case is a combination of three separate lawsuits, all of which presented facial challenges to Act 64. App. 104a, 110a. After an intensive period of discovery, the case proceeded to trial. The District Court heard extensive testimony over ten days of trial and received voluminous exhibits. In all, the Court heard from 30 witnesses -- including seven expert witnesses and numerous candidates, officeholders and citizens -- and admitted approximately 135 exhibits, amounting to more than 3,000 pages.

After reviewing the trial evidence and the evidence presented to the Legislature, the District Court upheld nearly all of the contribution limits of Act 64.[2] Regarding

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[1] Contrary to the assertion of the Petitioners, Act 64 does not broadly criminalize violations of the campaign finance law. Civil penalties govern all but the failure to file campaign finance reports. 17 V.S.A. §2806(a-b).

[2] The Court invalidated Act 64's limits on out-of-state contributions and on the amounts political parties could contribute to candidates. App. 67a-68a.

the expenditure provisions, the District Court found that they were supported by compelling interests and were set at appropriate levels for Vermont. App. 66a. It noted that: "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill." App. 66a. The Court refused to sanction the limits, however, based on its view that were prohibited by *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). App. 66a.

The Court of Appeals carefully reviewed the full trial court record. App. 111a, 129a, 144a, 157a. It gave special permission for the parties to submit the entire 2,395-page transcript to the appellate court.

The Second Circuit concluded that Vermont has a compelling interest in safeguarding the political process from the corruption and the appearance of corruption created by unfettered campaign spending and the contributor-dominated system that results from it. The Court found that expenditure limits were necessary in order to protect the public's faith in the fundamental principle that the government is accessible and accountable. App. 134a.

The Second Circuit further held that Vermont had an additional compelling interest in assuring that candidates and officeholders spend less time fundraising and more time interacting with voters and performing their official duties.[3] App.135a. Based on the Court of Appeals' independent examination of the record, it determined that: "Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office." App. 139a,

[3] Vermont asserted five compelling interests as justification for Act 64's expenditure limits. App. 127a. Since it found two of the interests sufficient to uphold the spending limits, the Court of Appeals did not analyze the remaining interests. App. 145a.



144a. The record, it concluded, provided detailed descriptions from knowledgeable witnesses of the ways in which large donors and special interests command the available time of candidates and public officials. Such evidence more than supported the compelling nature of this "time protection" interest. App. 139a-143a

The Second Circuit also ruled that the expenditure limits were set at levels that directly advanced the above compelling interests and that would permit effective campaign advocacy. App. 148a, 156a. It nevertheless remanded to the District Court for additional narrow tailoring analysis. It sought more evidence as to other possible regulatory options available and whether higher expenditure limits might equally serve the identified compelling interests. App. 157a-158a.

As to Act 64's contribution limits, the Second Circuit upheld all but the out-of-state contribution limitation. App. 184a. It endorsed the District Court's conclusion that "[l]arge contributions to candidates have undermined public confidence in Vermont's political system." App. 36a. The appellate court found that the contribution limits furthered compelling interests in reducing corruption and its appearance, and that the levels of the limits would permit vibrant campaigning and debate of issues, and were appropriately set for Vermont. App. 56a.

In addition, the Court of Appeals sanctioned the non-conclusive, rebuttable presumption of 17 V.S.A. §2809(d). That provision creates an evidentiary presumption that certain expenditures of parties and political committees to support six or fewer affiliated candidates are presumed to have been coordinated with those candidates. Such a presumption may be rebutted by evidence that there was, in fact, no coordination.[4] App. 86a.

[4] While Petitioners now purport to complain that Act 64's definition of "expenditure" is overly broad, 17 V.S.A. §2801(3), they did not challenge that definition in their complaints in the

## SUMMARY OF THE ARGUMENT

Issuance of a writ of *certiorari* as to Question One above is well justified. There is a marked division among the Courts of Appeals of the Second, Sixth and Tenth Circuits concerning whether this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) constitutes an absolute bar to limitations on the amounts that candidates may spend in an election. Even assuming it does not, the split extends to a second issue: is the interest in preventing corruption and the appearance of corruption in elective politics, and the interest in freeing candidates from the rigors of endless fundraising to permit them to focus on their official duties, sufficiently compelling to meet the exacting scrutiny of *Buckley*.

This Court should resolve the disagreement among the Circuits on this important issue at the earliest possible time. In the absence of such review, States and local governments will be left with conflicting guidance as to whether spending limits are permissible, and, if so, what precise constitutional standards govern them. They will likely consume precious legislative resources and engage in litigation surrounding such limits all on an uncertain legal playing field. Providing review at this

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District Court or in their briefs to the Court of Appeals. Aside from not properly raising this issue, Petitioners rely heavily on citations to information found in the dissenting opinion of Judge Winter. That opinion, however, includes extensive discussion of material that is not part of the record and was not considered below. Consideration of such information violates the principles of judicial notice. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 289 n.9 (1974) (Due Process forbids court from relying on disputed factual material when parties have not had an opportunity to contest it). Indeed, the resulting assumptions, that volunteered services, newspaper articles and monies spent defending actions under 17 V.S.A. §2809 are automatically treated as campaign contributions and expenditures, are not accurate.



time will bring clarity and provide direction on this vital issue.

This case is the ideal vehicle for such review. It presents a detailed legislative record as well as testimony and exhibits from a substantial trial. It provides convincing proof from the Vermont experience that contribution limits and voluntary spending caps alone are insufficient to deter corruption and its perception or to protect officials from being distracted from their duties by the need to fundraise. This never-ending desire for campaign money has forced candidates to become beholden to large groups of contributors and special interests that control access to such funds. The record verifies that, as a consequence, officials sometimes adopt positions on issues, set legislative agendas or take other actions based on concerns over losing or gaining such funding. All of this raises the specter of corruption and its appearance in the public's mind and causes citizens to lose trust in their government and their elected representatives.

Based on such a record, and contrary to the contentions of Petitioners, the Second Circuit's ruling does not conflict with *Buckley*. *Buckley* is not a *per se* bar to the enactment of spending limits and the interests offered in support of them here are compelling and were fully supported at trial.[5]

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[5] On June 4, 2005, the Legislature passed Bill S.16 amending portions of Vermont's campaign finance law. It awaits consideration by the Governor. Among other things, S.16 adjusts Act 64's spending limits for inflation, retroactive to 2001, and makes explicit what was implicit previously, namely that unaffiliated newspaper articles are not considered contributions or expenditures. *See* http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/passed/S-016.HTM. These limited amendments do not affect the propriety of granting a writ of *certiorari* as to Question One.

Lastly, Petitioners' request for a writ of *certiorari* concerning the contribution limitations and the rebuttable presumption of Act 64 do not meet the standards for issuance of the writ. There is no current quarrel among the Circuits on these issues, and Vermont's law is fully consistent with this Court's precedents. The Petitions should be denied as to Questions Two and Three above.

## ARGUMENT

### I. Issuance Of A Writ Of *Certiorari* Is Warranted At This Time To Resolve A Recurring Issue of National Import That Has Divided The Courts Of Appeals

### A. There are Two Divisions in the Circuits

Last term, Vermont joined in an *Amici Curiae* brief to this Court that highlighted the pronounced split among the Courts of Appeals concerning the constitutionality of expenditure limits. *See* Brief of the States of Connecticut, *et al.*, as *Amici Curiae*, in *City of Albuquerque v. Homans*, No. 04-413, at pp.1-5. The divide among the Courts of Appeals operates on two distinct levels: first, the Courts disagree as to whether *Buckley* foreclosed all consideration of spending limits; and second, they differ as to whether the interests relied upon by the Second Circuit in upholding the limits of Act 64 are compelling.

In *Landell*, the Second Circuit rightly found that this Court's ruling in *Buckley* does not constitute a complete bar to enactment of expenditure limits and that the interests in policing corruption and the appearance of corruption and the interest in protecting officials from being distracted from their duties by fundraising, justified Vermont's expenditure limits.

Prior to that ruling, the Sixth and the Tenth Circuits had held both that spending limits were absolutely



prohibited by *Buckley*[6] and that the compelling interests identified by the Second Circuit in *Landell* either were rejected by *Buckley*[7] or were legally insufficient to support expenditure limits. *Homans v. City of Albuquerque*, 366 F.3d 900, 907 (10th Cir. 2004), *cert. denied*, 125 U.S. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 913-19 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998).

The Circuit disagreements as to both of these constitutional points present questions worthy of *certiorari* review.

### B. The Constitutionality of Expenditure Limits Is A Recurring Issue Of National Significance

In the years since *Buckley*, efforts at campaign finance reform across the country have been legion. Vermont's experience has been that contribution limitations alone are insufficient to curb corruption and its appearance, to protect officials from endless fundraising so that they might focus on their duties, or to preserve the public's confidence in its government and elected representatives. Vermont enacted a comprehensive campaign finance reform statute to address those issues. Expenditure limits are an important part of that law.

Vermont is not alone in its conclusion that expenditure limits are a necessary part of campaign finance reform. In the last seven years, there have been decisions from Courts of Appeals in the West, the Mid-West and the East concerning the constitutionality of spending limits. *See supra* Section I(A). As detailed

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[6] While the Tenth Circuit suggests that *Buckley* is not an outright bar to spending limits, 366 F.3d at 915, the majority held that such limits could not be supportable "as a matter of law." *Id.* at 914.

[7] Although *Homans* held that protecting officials' time might be a compelling interest, it ruled the city had not proven its limits were necessary for that purpose. 366 F.3d at 912.

above, those decisions came to different conclusions. Their existence, however, is testament to the fact that other states and local governments will be considering spending limits and need guidance as to the circumstances that might justify such measures.

In fact, since the Second Circuit's decision in *Landell*, at least three states, Massachusetts, Oregon and North Carolina, have introduced legislation that includes limits on expenditures. *See* Brief of Respondent-Intervenors Vermont Public Interest Research Group, Inc., *et al.* ("VPIRG"), at Section I(B) n.4.[8]

Legal and political commentators as well have written and discussed the need to employ spending limits to curb campaign abuses, protect officials' time and restore faith in our democracy.[9] Such contentions are only likely to encourage the adoption of measures aimed at restraining expenditures.

In short, spending limitations are being, have been or will likely be considered in various jurisdictions throughout this country. Given that fact, the constitutionality of such limits presents a clear issue of national import that should be resolved by the Court at the earliest time.

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[8] Similar efforts have often been made at the federal level. *See, e.g.*, S. 1502 (106th Congress) (seeking limits on campaign expenditures in Senate campaigns); H.R. 77 (105th Congress) (similar limits for House races). Indeed, a joint congressional resolution has expressed the view that the First Amendment permits campaign expenditure limits. H. Cong. Res. 377 (106th Congress).

[9] *See, e.g.*, Mark Alexander, *Campaign Finance Reform: Central Meaning And A New Approach*, 60 Wash. & Lee L. Rev. 767, 814-21, 835-39 (2003); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1415, 1424-25 (1986).



### C. The Remand Further Counsels In Favor Of Granting *Certiorari* Review

The Second Circuit's decision to remand the expenditure limits to the District Court for further analysis of narrow tailoring weighs in favor of issuing a writ of *certiorari* at this time. The remand leaves the constitutionality of and the constitutional test for judging expenditure limits in an uncertain state for the foreseeable future. This not only places a burden on Vermont, it leaves other states and local governments with insufficient guidance regarding what facts and circumstances would support such limits.

The uncertainty created by the opinion below works at three levels: (1) does *Buckley* permit any spending limits; (2) are the compelling interests identified by the Second Circuit sufficient to support expenditure limits; and (3) what type of narrow tailoring must such limits pass under the First Amendment?

The Circuit split identified on the first two of these issues means that states and local governments in some parts of the country might seek to adopt expenditure limits based on the compelling interests set out by the *Landell* Court. As shown above, some have already done so.

During the remand period, legislatures could devote precious time and resources to the debate and consideration of expenditure limits. Enacted provisions likely would be the subjects of court challenges. If the Second Circuit's decision relied upon insufficiently compelling bases, or failed to address additional compelling interests or alternative constitutional analyses that might support expenditure limits, such efforts would amount to a great waste of public resources.

The same is true regarding the Second Circuit's lengthy description of the narrow tailoring analysis that should be undertaken on remand. App. 146a-167a. If the tailoring inquiry set out by the Second Circuit for remand

proves not to be the precise legal standard that should be employed, it would burden Vermont and other entities that might adopt spending limits. They would be forced to defend such limits in court proceedings that would likely follow that tailoring analysis. If the Second Circuit's test is not completely accurate, there will be an additional squandering of legislative and judicial resources.

Granting a writ of *certiorari* at this time makes both legal and practical sense. It will resolve the division among the Courts of Appeals and will provide instruction to all governmental bodies on this issue of central concern. While this Court declined to issue writs of *certiorari* in *Homans* and *Kruse*, the unique and voluminous legislative and trial records in this appeal make it more suitable for *certiorari* consideration.

## II. The Ruling Below Is Consistent With *Buckley* And Is Well Supported By The Record

While Petitioners accurately point out the discord among the Courts of Appeals on the expenditure limits issue, they incorrectly argue that the Second Circuit's decision in *Landell* conflicts with this Court's precedents. The opposite is true. *Landell* is faithful to this Court's jurisprudence and the record establishes its validity.

### A. The Second Circuit's Ruling Comports With *Buckley*

*Buckley* does not present a *per se* bar to adoption of expenditure limits. App. 113a-118a. Instead of a prohibition on spending ceilings, *Buckley* and its progeny have established only that expenditure limits are subject to closer exacting scrutiny than contribution limitations. *See McConnell v. Federal Election Comm'n,* 540 U.S. 93, 134 (2003). But, exacting scrutiny[10] does not sound the

[10] While the *Buckley* Court referred to "exacting scrutiny," 424 U.S. at 44, it did not cite strict scrutiny as the standard of review. *Cf. Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 386 (2000).



death knell for campaign finance laws. App. 125a-126a (noting same). As the Supreme Court has cautioned when applying the strict scrutiny standard of constitutional review: "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Marshall, J., concurring)).

And, this Court has validated a number of electoral regulations against First Amendment challenge even while applying strict scrutiny. *See Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) (statute restricting independent expenditures by corporations or campaigns); *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding ban on electioneering activity near polling places).

Indeed, one looks in vain in *Buckley* or later cases for a Court pronouncement that spending limits can never be sustained under the First Amendment. That silence is instructive. The Second Circuit correctly held that *Buckley* "did not conclude that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations." App. 114a.

Likewise, the Second Circuit rightly determined that the interest in avoiding corruption and the appearance of corruption coupled with the "time protection" interest are sufficient to meet the exacting scrutiny demanded by *Buckley*. Contrary to the Tenth and Sixth Circuits, *Buckley* does not foreclose consideration of the anti-corruption rationale with respect to restrictions on campaign spending. App. 135a (suggesting same). The *Buckley* Court declined to accept the anti-corruption rationale based upon the factual record presented. It did not make that ruling as a matter of law.

As the Second Circuit found, the *Buckley* Court "simply held that based on the record before it, '[n]o

governmental interest that has been suggested is sufficient to justify'" spending limits. App. 114a (quoting *Buckley*, 424 U.S. at 55). That record was also limited due to the Federal Election Campaign Act's ("FECA's") expedited review procedure. *Kruse*, 142 F.3d at 919 (Cohn, D.J., concurring) (*Buckley* based "on a slender factual record").

"Accordingly, after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record such that some expenditure limits could survive constitutional review." App. 114a. *See Nixon v. Shrink Missouri Government PAC ("Shrink")*, 528 U.S. 377, 405 (2000) (Breyer, J., concurring) (suggesting spending limits may be sustainable based on post-*Buckley* factual experience).

Petitioners' suggestion that corruption and the perception of corruption have no force outside of the contribution limit context, is unsupportable. Such reasoning reflects just the sort of "crabbed view of corruption and particularly the appearance of corruption" that this Court rejected in *McConnell*. 540 U.S. at 152-54. Instead, this Court has given an increasingly broad view of corruption and its appearance that extends beyond the archetypal example of vote buying. *Id*. at 153 (Congress has the power "to address more subtle but equally dispiriting forms of corruption"). It has made plain that "in addition to the actual influence of campaign contributions on politicians' behavior, the perception of corruption was an important part of this compelling state interest because it 'could jeopardize the willingness of voters to take part in democratic governance.'" App. 128a (quoting *Shrink*, 528 U.S. at 390). The spending limits of Act 64 address just such concerns regarding corruption and the perception of corruption in the political process.

Similarly, the time protection rationale was not fully considered in *Buckley* and is compelling. The *Buckley* Court was careful to state that only three possible



interests had been offered to justify FECA's limits: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates; and (3) restraining the cost of election campaigns for its own sake. 424 U.S. at 55-56.

While the Sixth Circuit equated the time protection concern with the third interest above, the Second Circuit correctly deemed it distinct. The Second Circuit found that "the language of *Buckley*, as well as an examination of the *Buckley* briefs, oral argument, and subsequent commentary from judges, and scholars," makes plain that the time protection interest and the interest in reducing costs of campaigns are different. App. 138a. *Accord Homans*, 366 F.3d at 911-12.

Indeed, three Justices of the United States Supreme Court have identified the protection of officials' time as a governmental interest that might support the constitutionality of spending limits. *See Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n ("Colorado Repulican")*, 518 U.S. 604, 649-50 (1996) (Stevens & Ginsberg, JJ., dissenting); *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting) (suggesting possibility of "a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1298 (1994) (endorsing time protection interest) [hereinafter "Blasi, *Free Speech*"].

Justices Stevens and Ginsberg have rightly acknowledged this critical interest supporting spending limits and how it may impact First Amendment values:

> It is wrong to assume that the net effect of limits on contributions and expenditures -- which tend to protect equal access to the political arena, *to free candidates and their staffs from the interminable burden of fund-raising*, and to diminish the importance of repetitive 30 second commercials -- will be adverse to the interest in informed debate protected by the First Amendment.

*Colorado Republican*, 518 U.S. at 649-50 (Stevens & Ginsberg, JJ., dissenting) (emphasis added).

In related contexts, this Court and Courts of Appeals have found the interest in time protection to be compelling. In *Buckley*, this Court relied upon that interest to sustain the public financing provisions of FECA. 424 U.S. at 91. Courts of Appeals have noted its compelling nature in upholding state public financing laws. *Rosentiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). App. 137a.

The Second Circuit correctly concluded that Vermont's interests in avoiding corruption and its appearance and in protecting officials' time are sufficiently compelling to meet the exacting scrutiny demanded by *Buckley*.[11]

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[11] Also, unlike the law at issue in *Buckley*, Act 64 only regulates the campaign expenditures *of or attributable to candidates*. Candidates choose to run for office. They may be required, *inter alia*, to obtain a certain number of signatures in order to appear on the ballot or may be required to be a resident of a state to even qualify as a candidate. Thus the system recognizes that by entering the political arena, candidates must agree to abide by certain rules and regulations to maintain the integrity of and public confidence in the electoral process. Vermont's expenditure limits follow in that tradition. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L. L. Rev. 1, 47-48 (1998).



### B. The Record Evidence Fully Supports The Compelling Interests Identified Below

Contrary to the positions of Petitioners, the unprecedented factual record of this case more than establishes the critical interests identified by Vermont in support of its spending limits. The Vermont Legislature held exhaustive hearings and made detailed Findings of Fact concerning Act 64. App. 122a-124a; 134a-135a. The District Court was no less thorough in its review of the extensive trial evidence.

The Second Circuit independently reviewed the entire record and endorsed the finding of the District Court that the "'e]vidence at trial overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics'" and that "'they have reason to feel that way.'" App. 128a-129a (citation omitted).

As the Second Circuit concluded, the source of such public concern comes not only from large contributions to candidates, but also from increasing campaign expenditures and the runaway "arms race" mentality that grips candidates and forces them to give access and preferences to monied interests. It also forces them away from their governmental duties and into a seemingly endless pursuit of funds. App. 128a-146a. The trial record fully supports these findings.[12]

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[12] Petitioners' underlying premise, that spending limits are somehow inconsistent with democratic governance, is incorrect. Prior to *Buckley*, numerous states and localities had long functioned with such limits. Internationally, many democracies, including Canada and England, limit the amounts candidates may spend to be elected. Roland S. Homet, Jr., *Fact-Finding in First Amendment Litigation: the Case of Campaign Finance Reform*, 21 Okla. City U. L. Rev. 97, 97 (1996).

### 1. Vermont's Spending Limits Avoid The Reality And Appearance Of Corruption In Politics And Government

The full factual record in this case presents far more evidence of the pervasive effects of unlimited campaign spending than was before the *Buckley* Court, and it leads to a different conclusion. App. 135a, 144a-146a. Vermont's experience in the years since *Buckley* convincingly establishes that contribution limits alone cannot stem corruption and its appearance in electoral politics.

Trial testimony of knowledgeable Vermont citizens, officeholders, candidates, and expert witnesses confirmed how a system of unlimited campaign spending undermines public confidence in government and leads voters to perceive that meaningful access to and influence over politics is only for the wealthy and special interests. *See, e.g.*, Trial Transcript ("Tr.") IX-57-58 (voters believe high spending campaigns reflect that candidates are running for special interests); Tr. IX-130 (with unlimited campaign spending, average citizens do not feel like "players" in politics); Tr. VII- 89-90.

In the words of the Second Circuit, as a result of such perceptions, "citizens in Vermont have consistently demonstrated a belief that the attention of their public representatives may be available for a price." App. 129a.

A survey by Celinda Lake, a nationally recognized public opinion researcher, confirmed that Vermonters are extremely concerned about the influence of special interests in the political process. Nearly three quarters of voters say that ordinary citizens do not have enough influence over politics and government in Vermont (74%), while similar percentages believe that wealthy individuals and large corporations exercise too much influence over politics and government (70% and 71%, respectively). App. 130a.



As the evidence showed, the public sees and understands that, even when individual contributions are limited, the pressure to raise unlimited amounts continues to make fundraising a central preoccupation of candidates, and that such fundraising heightens the potential for abuse of the system by special interests. *See, e.g.*, Ex. Vol.-III at E-0775.

Indeed, as a number of witnesses described, there is an "arms race" mentality that causes candidates to amass greater and greater campaign war chests, not because they are needed to conduct an effective campaign, but simply because of the candidates' fear of being outspent by an opponent.[13] Tr. VIII-57; *see also* Tr. VII-77-78, 90, 90; Tr. V-32-33; Tr. IX-134-35.

The need to have an endless amount of funding has a direct impact on the functioning of government and creates, at the very least, the appearance of corruption. Lawmakers are often fearful of upsetting their funding sources. The Second Circuit had before it strong evidence of how that fear impacts the legislative process in Vermont. For example, it can cause officials to take positions they might not otherwise have taken. "Candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds." App. 131a; *see McConnell*, 540 U.S. at 133-34 (noting similar pressures). *See* Tr. VII-56, 66 (party and

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[13] The trial testimony of two of Petitioners' witnesses about the 1998 Rutland County Senate race vividly demonstrates this state of mind. George McNeill, testifying for the Republican State Committee, argued that the Republican candidate needed to spend large amounts to overcome powerful opponents such as Steve Howard, a Democrat, who is one of the *Randall* Petitioners. Tr. II-145. Mr. Howard testified that he needed to spend large amounts in 1998 in order to overcome his opponents' advantages. Tr. IV-171.

party leaders urged legislators not to oppose pharmaceutical interests for fear of being "shut off in the next election cycle from any contributions"); Tr. VIII-43 (when voting on issue affecting ophthalmologists, lawmaker considered potential loss of further support from that group).

The money factor can also determine how officials set the legislative agenda and who gets access to the officials. Voluminous evidence established below that "'there is an agenda out there that is pretty much set by folks that are not elected.'" App. 132a. In light of the need for money, officials "pay attention to which contributor 'wants what to happen in terms of the language of the bill, in terms of calendaring the bill, in terms of writing the rules.'" App. 131a. Similarly, if there are telephone calls to be returned and limited time to do it, contributors' calls are often given preference. App. 132a & n.12. The Second Circuit concluded that "[c]andidates, often with great reluctance, accept the bargain with contributors so that they do not lose large sources of potential fundraising for the 'arms race' in which they feel compelled to participate." App. 132a-133a; *see McConnell*, 540 U.S. at 134.

Vermont citizens are well aware of this interaction and it has marginalized them from the political process in favor of monied interests. As one former Legislator put it:

> Citizens have reported that they do not vote because "'[a]ll the big money controls everybody in Montpelier anyways.' ... They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong.

App. 130a.

Contribution limits alone simply cannot guarantee that candidates will escape the influence of wealthy or special interests. For example, in Vermont, powerful interests such as the ski industry can, even under Act 64's contribution limits, still funnel large sums to single



candidates with contributions from each of the state's ski companies. Tr. VIII-192-94. Likewise, the ability of special interests to "bundle" groups of contributions creating, in essence, a single, extremely large donation, only exacerbates such concerns. App. 133a.

Curbing campaign spending, and the corresponding reliance on groups of big donors and special interests, will change "the shape and nature of the marketplace," and politicians will no longer need to continue "the sort of stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Tr. VIII-57. Under such a system, candidates will no longer fear that opposing the causes of such interests will result in a severe disadvantage in the race for unlimited campaign funds. Only with spending limitations in place can the public be confident that there is little need for candidates to curry favor with groups of large donors.

Based upon such considerations, the Second Circuit correctly found that:

> Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates. The evidence at trial demonstrated that money—and the special interests that wield it—has a great influence on candidate behavior in Vermont, at the expense of the electorate as a whole, since candidates depend on it in order to run for office. Where access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power. The accessibility and accountability of public officials—and the public's faith that Vermont's

government is accessible and accountable—are fundamental to any democratic system.

In our view such influence of campaign contributors is pernicious because it is bought. Certain private citizens and organizations should not be given greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns. Even with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors pay for their campaigns.

App. 134a (citations omitted).[15]

### 2. Vermont's Spending Limits Assure That Officeholders Will Spend Less Time Fundraising And More Time Interacting With Voters And Performing Official Duties

The record also well supports the Second Circuit's determination that spending limits directly further the State's compelling interest in freeing elected officials from the pressures of fundraising so that they may focus their attention on carrying out their official duties. It endorsed the finding of the District Court that Vermont had proven

[15] The argument of Petitioners and the Dissent below, that expenditure limits amount to incumbency protection devices, could not be further from the truth. It is the existing system that gives incumbency such an enormous advantage. The evidence in this case establishes that the greatest benefits of incumbency are the abilities to greatly outspend opponents and to amass huge war chests from large, monied interests. This makes it nearly impossible to mount a challenge to current officeholders. Tr. X-80-81. The evidence demonstrated that spending limits would reduce the advantages of incumbency. App. 152a. Further, Act 64 actually makes an accommodation for any benefits of incumbency by allowing non-incumbents to spend more than incumbents. 17 V.S.A. §2805a(c); App. 7a.



that "'the need to solicit money from large donors at times turns legislators away from their official duties.'" App. 135a. Act 64's spending limits directly address this critical problem.

The increasing amount of time that candidates must spend raising campaign funds was a prominent concern during the public debate leading up to the enactment of Act 64. In a January 1997 article, former Vermont Secretary of Administration David Wilson noted that: "Politicians are forced to spend as much time begging as they do campaigning." Ex. Vol.-III at E-0773.

Legislators such as Senator William Doyle voiced this same worry. He stated that Act 64 was necessary so that "there will be increased time for real debate; [and] that candidates will be able to concentrate more on issues rather than raising public money." Ex. Vol.-I at E-0092. *See also* Blasi, *Free Speech*, 94 Colum. L. Rev. at 1298 (reducing time spent fundraising enhances "quality of representation" provided by officials).[15]

[15] Both Democrats and Republicans in Congress have acknowledged how the need to fundraise detrimentally impacts the functioning of government. *See, e.g.*, 147 Cong. Rec. S2857 (daily ed. Mar. 26 2001) (statement of Sen. Byrd) ("It is a vicious circle that requires candidates to spend more and more time raising money and less and less time listening to the people and working for the people...."); 131 Cong. Rec. S74 (daily ed. Jan 3, 1985) (statement of Sen. Goldwater) (The "demands of the fundraising treadmill will force more and more office holders to neglect their duties to patronize big donors and PAC events around the Nation. The 3-day legislative week is already becoming commonplace in Washington, D.C., so that Members can escape town to fulfill the never-ending quest for campaign funds.").

Such evidence was reiterated at trial. Former Legislator and then-Auditor of Accounts Elizabeth Ready described the effect of spending limits as follows:

> If I can go out and raise what I have to raise and know that those limits are in place, I can spend the whole rest of my campaign, once I have raised that money, out with the public, okay. I can go door to door. I can go around to local events. I can go to the county fairs. I can have a little booth, you know, and be talking to people. I am not going to be locked away, you know, in the Democratic Party somewhere or in my own office somewhere making fundraising calls.

Tr. IX-129; *see* Tr. VII-57-62.

Similarly, former Lt. Governor and Congressman Peter Smith explained that the further one progresses politically, the more time one spends raising money and paying attention to groups of big money contributors. Tr. VIII-23-24. This constant pressure to raise money keeps the candidates away from the general public and distracts them from their official duties.[16]

Moreover, since much of their days are spent raising money, officials tend to give their most precious commodity – access time – to the persons and entities from which they obtain funds. The Second Circuit correctly determined that this has an impact on the information that candidates receive and the opinions they hear. "Even if candidates receive valuable information during every hour spent fundraising, their time is being controlled by those with campaign cash, and this effect is corrosive." App. 141a.

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[16] The public is well aware of this effect. Survey data confirmed that 85% of Vermonters were concerned that their elected officials are being diverted from their duties in order to raise money. App. 142a.



These results are harmful to good government, harmful to officials and candidates, and harmful to the people of Vermont. As the Second Circuit found: "Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." App. 142a.

Act 64 works to end that legacy by enabling officials to attend to their duties and to interact on a substantive level with voters. The Second Circuit's ruling that Act 64's spending limits directly further the compelling interest in permitting candidates and officials greater opportunity to devote themselves to government business and citizen interaction is well supported by the record.[17]

## III. The Contribution Limits of Act 64 Do Not Warrant *Certiorari* Review[18]

There is no division in the Circuits concerning the constitutional standards governing contribution limits, and the ruling below is fully consistent with this Court's precedents. Petitioners have presented no basis for granting a writ of *certiorari* on this issue.

### A. There is No Division Among the Circuits

The Petitioners concede that there is no split among the Circuits on the question of whether limits on contributions to candidates may be upheld under the First Amendment. Instead, they argue that this Court should take this question in order to "clarify" the law. Vermont

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[17] Respondents join in the arguments presented by Respondent-Intervenors VPIRG, *et al.*, at Section I(C)(3) of their brief addressing alternative bases for affirming the decision below and supporting issuance of a writ of *certiorari*.

[18] Respondents join in the arguments presented by Respondent-Intervenors VPIRG, *et al.*, at Section II of their brief explaining why the Court should deny review as to the rebuttable presumption found in 17 V.S.A. §2809(d).

Republican State Committee, *et al.* ("VRSC"), Petition at 19-20. There is nothing unclear about the applicable standard for evaluating contribution limits, however. *Buckley* and *Shrink* set out the First Amendment test for contribution limits, and the Courts of Appeals have followed it.

All of the courts considering limits on contributions to campaigns since this Court's decision in *Shrink* have upheld the limits. *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003), *cert. denied,* 125 S.Ct. 47 (2004); *Frank v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002), *cert. denied,* 537 U.S. 1160 (2003); *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000); *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 842 (8th Cir. 2000); *Florida Right to Life, Inc. v. Mortham*, 2000 WL 33733256 (M.D. Fla. March 20, 2000).

In addition, this Court has rejected requests for writs of *certiorari* in a number of cases that analyzed contribution limits, including *Eddleman* and *Frank* above and *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (Alaska 1999), *cert. denied,* 528 U.S. 1153 (2000).[19]

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[19] This Court has made clear that there is no reason to treat parties and PACs differently from individual contributors. *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 455-56 (2001); *see also California Democratic Party v. Jones*, 530 U.S. 567, 588-89 (2000) (Kennedy, J., concurring)(a majority of the Court permits states to limit the amounts parties spend in collaboration with candidates). Further, there is no conflict among the Circuits as to the constitutionality of contributions by political parties to candidates. *Missouri Republican Party v. Lamb*, 270 F.3d 567, 570-71 (8th Cir. 2001), *cert. denied,* 535 U.S. 1113 (2002); *Alaska*, 978 P.2d at 625-26; *Citizens for Responsible Gov't v. Buckley*, 60 F. Supp. 2d 1066, 1095 (D. Colo. 1999), vacated, 236 F.3d 1174 (10th Cir. 2000). Nor do Petitioners point to any dispute among the Circuits on the standards for limiting contributions by PACs to candidates. Several lower courts have upheld limits on such contributions by PACs. *Eddleman*, 343 F.3d at 1096; *Daggett*, 205 F.3d at 452, 462; *Kentucky v. Terry*, 108 F.3d 637, 648-49 (6th Cir.), *cert. denied,* 522 U.S. 860 (1997); *Gard v. Wisconsin*, 456 N.W.2d 809 (Wis.), *cert. denied,* 498 U.S. 892 (1990).



The only cases proffered by Petitioners as being "in conflict" with the above rulings pre-date this Court's 2000 decision in *Shrink*. VRSC Petition at 17 (citing cases in the Eighth and Ninth Circuits). Subsequent decisions from those Circuits, though, have followed the *Shrink* analysis and upheld contribution limits. The Eighth Circuit validated contribution limits of $275 for State House candidates, $525 for State Senate candidates, and $1075 for statewide candidates per election. *Adams*, 204 F.3d at 842. The Ninth Circuit confirmed limits of $400 for candidates for Governor and Lieutenant Governor, $200 for other statewide positions, and $100 for all other offices per election. *Eddleman*, 343 F.3d at 1096.

Petitioners' suggestion that Vermont's contribution limits, 17 V.S.A. §2805 (App. 4a-6a), are draconian is refuted by the decisions in other Circuits. Act 64 allows contributions to statewide candidates up to $400 per general election cycle. This is essentially the same as the limits of $200 per election for most statewide Montana races upheld in *Eddleman*.[20] They also compare favorably with contribution limits found constitutional in Missouri and Maine. App. 57a-58a. As the District Court found, "[p]roportionally speaking, Vermont's limits are perhaps

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[20] Montana's limits of $400 per election in the Governor and Lieutenant Governor races is also comparable to Vermont's $400 limit per election cycle given the relative size of the states. The population of Montana was 902,195 in 2000, one and one half times as large as Vermont's. In addition, since there are only one and one half months between the primary and general elections in Vermont, the overlap between the primary campaign and the general election campaigns is so significant that the two practically blend together. App. 60a. This alleviates the need for a separate limit for primary election contributions.

even more generous than those of Maine," because the relevant districts contain fewer voters for each candidate to reach.[21] *Id.*

### B. Vermont's Contribution Limits Comport With *Buckley* and *Shrink*

Lacking divergence in the Circuits, Petitioners' last claim is that Act 64's limits violate the principles of *Buckley* and *Shrink*. The contention is meritless. Contribution limits will be upheld unless "the contribution limitation is so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397. Courts typically give great weight to legislative judgments and do not fine-tune the precise levels of the limits. *Shrink*, 528 U.S. 327; *Buckley*, 424 U.S. at 30. The Second Circuit correctly applied this standard. App. 168a-171a. There was not even a dissent on the panel below on this question. App. 194a.

Based on the costs of campaigning in Vermont, the history of campaign spending and campaign contributions, and other evidence examined by the Legislature and at trial, the contribution limits established by Act 64 would allow candidates to amass sufficient resources to run effective campaigns. App. 32a-33a, 39a-41a.

The evidence in the record of the one campaign conducted subject to the contribution limits prior to trial conclusively demonstrated that effective campaigns can be fully financed under Act 64's limits. In the 1999 contest for Mayor in the City of Burlington, Kurt Wright faced

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[21] Act 64's statewide limit is also at least as generous as the $500 per statewide election and $1,000 per election cycle limits upheld in Florida. *Florida Right to Life*, 2000 WL33733256 at *3. Florida allowed contributions two and one half times as large as Vermont's despite its likely higher costs and the fact that its population is 26 times greater. *See* www.census.gov.



incumbent Peter Clavelle. Subject to contribution limits of $200, the candidates in that race were not only able to raise more money than in previous mayoral races, they actually raised more money than in previous countywide state senate races. App. 58a-59a. Kurt Wright testified at trial that he ran an effective campaign in a competitive race against an incumbent. App. 41a.

Petitioners' suggestion that the District Court and the Second Circuit gave only cursory review to the contribution limits is unsupportable. The District Court examined the legislative record, took new evidence and, at times, interrogated trial witnesses. Its analysis was rigorous. In many instances, the witnesses offered contradictory testimony and the District Court had to make determinations of credibility. App. 40a.

For each piece of evidence that the Petitioners assert as support for their positions, VRSC Petition at 22-25, the record contains persuasive, countervailing evidence. For example, trial evidence showed that the limits of Act 64 were directed at amounts "considered suspiciously large by the Vermont public," App. 34a, that the limits affected less than 10% of overall contributions, App. 57a, and that, based on the standard Vermont practice of employing low-cost campaign methods and the relatively small cost of media, App. 44a, 155a-156a, effective campaigns can be run using the limits of Act 64, App. 41a & n.20, 171a. The 1999 Burlington mayoral race confirmed the validity of such evidence.

Petitioners' request that this Court reassess the Second Circuit's factual analysis on such points simply does not warrant *certiorari* review. They do not contend that the appellate court applied the wrong rule or misunderstood the law. At most, Petitioners' argument boils down to a criticism of the Second Circuit's application of the law to the facts. That Court's judgment, though, is in keeping with the approach of other Circuits, and is supported by the record. As Supreme Court Rule

10 indicates, a writ of *certiorari* is "rarely granted" to review such matters. It should not be issued here.

## CONCLUSION

The Petitions for Writs of *Certiorari* should be granted as to Question One set out above and otherwise denied.

Respectfully submitted,

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